

BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

Review of Nonpostal Services)

Docket No. MC2008-1
(Phase IIR)

PUBLIC REPRESENTATIVE REPLY COMMENTS
IN RESPONSE TO ORDER NO. 1043

(January 23, 2012)

I. INTRODUCTION

On December 13, 2011, the Commission issued Order No. 1043¹ requesting comments and reply comments to consider issues raised by the United States Court of Appeals for the District of Columbia Circuit in *LePage's 2000, Inc. v. Postal Regulatory Commission*, 642 F.3d 225 (D.C. Cir. 2011). Along with the Public Representative, Pitney Bowes, Inc. (Pitney Bowes), LePage's 2000, and LePage's Products, Inc. (collectively, "LePage"), and the Postal Service filed initial comments.² In these reply

¹ Notice and Order Establishing Procedures on Remand, December 13, 2011 (Order No. 1043).

² Public Representative Comments in Response to Order No. 1043, January 13, 2012 (PR Comments); Comments of Pitney Bowes Inc., January 13, 2012 (PB Comments); Comments of LePage's 2000, Inc., and LePage's Products, Inc., to the Commission's Notice and Order Establishing Procedures on Remand, January 13, 2012 (LePage Comments); United States Postal Service Initial Comments on Remand, January 13, 2012 (Postal Service Comments).

comments, the Public Representative responds to arguments made by Pitney Bowes, LePage, and the Postal Service in their initial comments. Specifically, these reply comments address the following topics: (1) clarification of the definition of the nonpostal service of licensing, (2) LePage's and the Postal Service's use of the wrong legal standard, (3) the record basis for finding that there is no public need for licensing the Postal Service's trademarks and copyrights for use on mailing and shipping supplies due to the potential for consumer confusion, (4) the mutual exclusivity of postal services and nonpostal services, and (5) LePage's improper request for discovery and to reopen the record.

II. THE COMMISSION SHOULD CLARIFY THE DEFINITION OF THE NONPOSTAL SERVICE OF LICENSING

In its comments, Pitney Bowes argues that the Commission's initial approval of licensing as a "general service" should be refined. PB Comments at 5-7. Pitney Bowes also argues that the public need for a particular nonpostal service cannot be assessed in the abstract. PB Comments at 16. Rather, it contends that for licensing, the Commission must assess the public need or consumer demand for the service "in relation to some other end product or group of products." *Id.* The Public Representative agrees.

On remand, the Commission should clarify that the product being "offered by"³ the Postal Service with respect to licensing is not "licensing" in the abstract sense. The product "offered by" the Postal Service is "licensing certain trademarks or copyrights for use on [a particular item]." With respect to licensing for mailing and shipping supplies, the product being "offered by" the Postal Service is a license of certain trademarks and copyrights for use on envelopes, or other mailing and shipping supplies. This clarified

³ Title 39 U.S.C. 404(e)(3) requires the Commission to review "each nonpostal service offered by the Postal Service." (emphasis added).

definition of the product being offered by the Postal Service ensures that the underlying item branded with the Postal Service's trademark or copyright receives due consideration. As Pitney Bowes points out, the relationship of the trademark or copyright to the end product is critical and allows the Commission to harmonize its distinction in Phase I of this case between commercial and promotional licenses with its regulatory policy to treat licenses for use on mailing and shipping supplies differently than other licensing arrangements. PB Comments at 16-17.

Such a definition would also be in accord with the goals, statutory language, and case law of trademark and copyright law. Trademark and copyright laws do not allow the Postal Service to give a carte blanche license to a licensee to use its trademarks or copyrights in any manner the licensee wishes. See *generally* Public Representative Response to Order No. 126: Supplemental Briefing on Licensing Agreements, November 24, 2008. The licenses must be for use of particular trademarks and copyrights on particular items. Otherwise, the Postal Service risks giving up such trademarks and copyrights. *Id.*

III. THE APPLICABLE LEGAL STANDARD

LePage erroneously cites to an inappropriate legal standard for determining whether there is a public need for licensing of the Postal Service's trademarks and copyrights for use on mailing and shipping supplies. LePage erroneously argues that the Commission cannot make a finding that there is no public need for licensing of Postal Service trademarks and copyrights for use on mailing and shipping supplies because there is not "substantial evidence" in the record to support such a finding. LePage Comments at 30, 39-40.⁴ The Postal Service implicitly makes a similar

⁴ LePage inappropriately claims that "[t]he Record is Devoid of the **Requisite 'Substantial Evidence'** Showing that the Mailing & Shipping Program Causes Consumer Confusion...." LePage Comments at 30. (emphasis added). LePage also erroneously claims that "the Commission cannot,

argument.⁵ LePage's and the Postal Service's arguments in this respect suffer from a fundamental misunderstanding of administrative law.

The Administrative Procedure Act (APA) only requires an agency to justify its actions with substantial evidence in the case of formal rulemakings or formal adjudications. See 5 U.S.C. 706(2)(E). Of course, formal rulemaking and formal adjudications are only required when the agency's enabling statute requires an agency to act "on the record after an opportunity for agency hearing." See e.g., *United States v. Florida East Coast Railway*, 410 U.S. 224 (1973); *Vermont Yankee Nuclear Power Co. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978); *Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 U.S. 633 (1990). Clearly, 39 U.S.C. 404(e) does not require the Commission to act "on the record, after an opportunity for hearing" with respect to determining whether certain nonpostal services may continue in operation.⁶

Since the Commission's review of the Postal Service's nonpostal services are not formal adjudications or formal rulemakings, the Commission's findings of fact are judicially reviewed by an "arbitrary and capricious" standard. See 5 U.S.C. 706(2)(A). This is important because the arbitrary and capricious standard is more deferential than the substantial evidence standard erroneously relied upon by LePage and the Postal Service. *American Paper Institute v. American Electric Power Service Corp.*, 461 U.S.

however, find that the Mailing & Shipping program does not satisfy the public need test on the existing record because such a finding would not be supported **by 'substantial evidence.'**" *Id.* at 39-40 (emphasis added) (citing cases).

⁵ The Postal Service inappropriately cites *Safe Extensions v. FAA*, 509 F.3d 593, 605 (D.C. Cir. 2007) and states that the court notes "that '[a]n agency's unsupported assertion does not amount to **substantial evidence.**'" (emphasis added). Postal Service Comments at 13.

⁶ Indeed, the only type of proceeding that the Commission must conduct pursuant to the formal rulemaking or adjudication procedures of the APA are Nature of Service cases under 39 U.S.C. 3661.

402, 412 n.7 (1983); *Camp v. Pitts*, 411 U.S. 138, 141-42 (1973).⁷ Thus, the Commission only needs to make a reasoned decision to avoid being overturned on appeal. *FCC v. Fox Television Stations*, 129 S.Ct. 1807, 1810 (2009) (Under the “arbitrary or capricious” standard of review, a court is not to substitute its judgment for that of agency, and “should uphold a decision of less than ideal clarity if agency’s path may reasonably be discerned.”).

IV. THE RECORD CONTAINS A BASIS FOR FINDING THE EXISTENCE OF CONSUMER CONFUSION

The Postal Service and LePage erroneously argue that there is a dearth of potential for consumer confusion regarding the use of Postal Service trademarks and copyrights on LePage’s products. In particular, the Postal Service states that “the Commission’s assertions^[8] in Order No. 392 that the Postal Service-branded mailing and shipping products ... cause customer confusion lack any evidentiary or logical basis.” Postal Service Comments at 11.⁹ This argument is without merit.

The Public Representative has repeatedly pointed out a real concern for consumer confusion regarding licensing of the Postal Service’s copyrights and trademarks.¹⁰ These supported arguments¹¹ demonstrate that consumers can be

⁷ The Supreme Court has held that lower courts may not require agencies to use procedures beyond those required by procedural provisions of the APA or their enabling legislation. *Vermont Yankee Nuclear Power Co. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978).

⁸ The Postal Service appears to misunderstand the Commission’s role as fact-finder and decision-maker in this proceeding. It is not a party in interest. As such, the Commission does not make “assertions,” it makes decisions and findings of fact and law. Similarly, the Postal Service’s accusation that “the Commission presents no evidence that...” is also improper. *Id.* at 12. The Commission does not present evidence; it assigns weight to evidence presented by the participants.

⁹ LePage makes a similar argument under the inappropriate “substantial evidence” standard discussed above. LePage Comments at 30, 39-40.

¹⁰ See e.g., Public Representative Response to Order No. 126: Supplemental Briefing on Licensing Agreements, November 24, 2008 at 2-3; Initial Brief of the Public Representative, July 21, 2009 at 2-5.

confused about the manufacturer and guarantor of products containing Postal Service trademarks and copyrights. As the Public Representative noted in previous filings, the entire purpose behind trademark law is to protect consumers from confusion and deceptive practices.¹² This body of trademark law also applies to licensing trademarks for use by other entities. *Id.*

Similarly, it is disingenuous for the Postal Service to attempt to argue that “if these products were causing widespread confusion among consumers, one would expect customers to have complained to the Postal Service.” Postal Service Comments at 15. As cited above, the Public Representative, on behalf of his client -- the general public including postal consumers -- has been repeatedly voicing concerns in this proceeding about consumer confusion. Concerns relating to consumer confusion cannot be “addressed and resolved” by Postal Service “representations” to the Commission that “it was working on modifying the licensed packaging,” as LePage argues. LePage Comments at 30. These consumer confusion concerns relate to all licensing for use on all mailing and shipping supplies whether by LePage or another licensee.

Additionally, the United States Court of Appeals for the Second Circuit stated the following fundamental principle of trademark law as it applies to licenses:

The public is hardly in a position to uncover deceptive uses of a trademark before they occur and will be at best slow to detect them after they happen. Thus, unless the licensor

¹¹ Of course, in informal rulemaking and adjudications, agencies are not required to follow the strict, technical court-like rules of evidence in assembling their underlying records. *Opp. Cotton Mills v. Administrator*, 312 U.S. 126, 155 (1941). For example, the Ink Cartridge filed as Library Reference PB-LR-1 clearly demonstrates that consumers can be confused that LePage is the actual manufacturer and provider of the guarantee. Initial Brief of the Public Representative, July 21, 2009 at 2-5; *see also* Notice of Pitney Bowes Inc. of Filing of Library Reference PB-LR-1, May 12, 2009.

¹² *See e.g.*, Public Representative Response to Order No. 126: Supplemental Briefing on Licensing Agreements, November 24, 2008 at 2-3; Initial Brief of the Public Representative, July 21, 2009 at 2-5.

exercises supervision and control over the operations of its licensees the risk that the public will be unwittingly deceived will be increased and this is precisely what the Act is in part designed to prevent. ... Clearly the only effective way to protect the public where a trademark is used by licensees is to place on the licensor the affirmative duty of policing in a reasonable manner the activities of his licensees.

Dawn Donut Co. v. Hart Food Stores, Inc., 267 F.2d 358, 367 (2d Cir. 1959); *Bonita Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 157 (1989) (although unfair competition law may create “quasi-property rights,” the focus is consumer protection not encouraging innovation by protecting producers); *accord Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 774 (1992).¹³ Requiring “evidence” of this point would be akin to requiring the parties to submit evidence supporting the reasons that Congress enacted trademark laws.

The Postal Service and LePage also suggest that there is no evidence to support a finding that a mailing or shipping product containing the Postal Service’s copyright or trademark is “more desirable.” LePage Comments at 33; Postal Service Comments at 11-18. This argument is disingenuous. If LePage’s name and logo were as desirable as the Postal Service’s, then LePage would not be willing to pay the Postal Service for a license to use the Postal Service’s copyrights and trademarks on its merchandise. If that were the case, LePage would simply keep those royalty fees and put its own name and logo on its manufactured mailing and shipping products and sell such products. Such a situation would allow LePage to enhance its own brand rather than seek to piggyback on the Postal Service’s brand. However, here, LePage’s business model is based on borrowing the Postal Service’s credibility. LePage has determined that it will make more money selling its own mailing and shipping supplies using the Postal

¹³ See *also* S. Rep. No. 1333, 79th Cong., 2d Sess., 4 (1946) (By protecting trademarks, Congress hoped “to protect the public from deceit, to foster fair competition, and to secure to the business community the advantages of reputation and good will by preventing their diversion from those who have created them to those who have not.”).

Service's trademarks and copyrights on its products (instead of its own brand name) than it is paying the Postal Service in royalties.

V. "POSTAL SERVICES" AND "NONPOSTAL SERVICES" ARE MUTUALLY EXCLUSIVE CATEGORIES

LePage appears to suffer from a fundamental misunderstanding of the *LePage's* court's order and difference between a "postal service" and a "nonpostal service." On page 1 of its comments, it states:

the only reasonable conclusion the Commission can reach ... is that the United States Postal Service's (the "Postal Service" or the "USPS") licensing of its brand for use on mailing and shipping supplies sold by private retailers (the "Mailing & Shipping program") is **both**: (a) a **"postal service,"** not subject to review under the PAEA; **and** (b) a **"nonpostal service"** which should be grandfathered under the PAEA....

LePage Comments at 1 (emphasis added). As Pitney Bowes points out, the term "postal service" and the term "nonpostal service" are mutually exclusive. PB Comments at 11. Indeed, the statute explicitly defines "nonpostal service" as "any service that is not a postal service." 39 U.S.C. 404(e)(1). Thus, because licensing in general was determined to be a "nonpostal service" by the Commission in Phase I, a subset of licensing, licensing of trademarks and copyrights for use by licensees on mailing and shipping supplies must also be a nonpostal service.¹⁴

¹⁴ LePage concedes that licensing of the Postal Service's trademarks and copyrights for use on mailing and shipping supplies is "simply a subset of the Postal Service's licensing program..." LePage Comments at 27.

**VI. LEPAGE'S IMPROPER REQUEST FOR DISCOVERY
AND TO REOPEN THE RECORD**

LePage appears to regret its tactical decision to not actively participate in this proceeding until after the Commission issued its final order in Phase II. The MC2008-1 docket and its progeny have seen over 20 participants, numerous pleadings, and rounds of evidence filed over the course of several years. LePage, who did not submit any prior pleadings or evidence, now seeks another bite at the apple in the form of discovery and an opportunity to submit new evidence in what can only be characterized as an attempt to begin this case anew. LePage Comments at 25, 38. First, the Commission has never allowed any parties to conduct discovery in this proceeding; it should not grant that special privilege to LePage at this late stage. Second, reopening the record at this time would be extremely prejudicial to those parties who have been appropriately following the Commission's rules.¹⁵ It would also require participants to expend additional time and resources unnecessarily prolonging this proceeding. Such action would appear to be at odds with the Postal Service's recent request for the Commission to take "prompt action." United States Postal Service Motion for Clarification on Remand, December 12, 2011 at 2.

Respectfully Submitted,

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¹⁵ It could also set an undesirable precedent showing that Commission proceedings can be re-litigated at any time.